The Relator-Appellant claimed in its petition that Ordinance No. 288-1956 as amended by Ordinance No. 78-1957 is unreasonable and arbitrary in its prohibition of the line in question and is, in its application, an impairment of the franchise ordinance of 1906, and a deprivation of the property of Relator-Appellant without the due process of law required by the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals found as a fact from the evidence that the proposed line would involve no appreciable danger to the public health, safety or welfare and held (1) that the prohibition of overhead construction was on the facts contrary to due process and (2) that the prohibition of construction within the City of Euclid for service to non-resident consumers was an unconstitutional impairment of Relator-Appellant's franchise contract with the Respondent-Appellee city.

In an opinion announced July 15, 1959, the Supreme Court of Ohio, dividing 4 to 3, held, on the basis of "judicial notice," that contrary to the express finding of fact below, the proposed construction was dangerous, that the prohibition of overhead construction was consistent with due process so that the permit was properly refused on that ground. It was thus unnecessary for the Court to pass upon the question of impairment of contract and it did not do so. The ground of the Court's decision was not suggested by any party.

On application of Relator-Appellant, filed on July 28, 1959, a rehearing was held on October 6, 1959. The Supreme Court of Ohio, in a per curiam opinion announced on November 4, 1959, ruled that it would adhere to its former judgment of July 15, 1959. Relator-Appellant filed a notice of appeal with the Clerk of the Supreme Court of Ohio on January 19, 1960.

Title 28, United States Code, Section 1257(2) authorizes the United States Supreme Court to review the decision of the Supreme Court of Ohio in this case by appeal. That section provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity."

The following cases sustain the jurisdiction of the Supreme Court to review a decision of a state supreme court sustaining an ordinance claimed to be repugnant to the Constitution of the United States. *King Manufacturing Co. v. City Council of Augusta*, 277 U. S. 100 (1928); *Jamison v. Texas*, 318 U. S. 413 (1943); *Breard v. City of Alexandria*, 341 U. S. 622, 625 (1951); *Poulos v. New Hampshire*, 345 U. S. 395, 402 (1953); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 79 (1947).

STATUTES INVOLVED.

Ordinance No. 288-1956 of the City of Euclid, as amended by Ordinance No. 78-1957, which Relator-Appellant claims is repugnant to the Constitution of the United States provides:

> "Now, THEREFORE, be it ordained by the Council of the City of Euclid, State of Ohio:
>
> "*Section 1: Pole Lines.*
>
> "No person, firm or corporation shall erect or construct or cause to be erected or constructed any pole for any guy line, wires, or electrical conductors of any

description whatever upon or across any streets, avenues, alleys or public property within the City of Euclid without first having obtained a permit therefor.

"*Section 2: Permits.*

"In the case of a telephone company, such permit shall be issued by the Administrative Director. In the case of an electric company, the Administrative Director is hereby authorized to issue such permit, where the voltage to be carried is solely for the use by a residential, institutional or governmental consumer within the City of Euclid, or solely for the normal requirements of an industrial or retail business, or service consumer within the City of Euclid and provided that such voltage at no time shall exceed 33 KV. In the case of an electric company where the proposed voltage to be carried does exceed 33 KV, the permit shall be authorized by the Council. The form of the permit shall be as approved by the Director of Law and no fee shall be charged for such permit. Such permit shall specifically be subject to the terms and conditions of all ordinances of the City of Euclid pertaining to any franchise rights of the public utility and to the provisions and reservations of Article IX of the Charter of the City of Euclid. No permit shall be issued until the public utility shall first have filed appropriate plans in the office of the Administrative Director, which shall be permanently filed in his records.

"*Section 2.1: Permit Issued by Council.*

"It shall be unlawful to construct or maintain an electric power line carrying greater voltage than 33 KV, without first obtaining a permit therefor from the Council. No charge shall be made for such permit. The applicant shall first file plans and specifications, which shall show the course and route of such proposed line in or through the City of

Euclid. Such line shall be installed underground, at a minimum depth of six feet below grade. It shall be backfilled by and laid in at least six inches of sand. It shall be standard underground pipe-type cable, lead covered, to be no less than the standard minimum A.E.I.C. specification as to voltage, herein adopted. Such line shall be encased in an enclosed sealed and welded steel pipe with protective sheath, having a somatic coating. Such pipe may either be oil or gas filled and shall be capable of withstanding any maintained pressure.'"

Ordinance No. 32, which was duly accepted by the Relator-Appellant, is the franchise contract which Relator-Appellant claims is impaired by Ordinance No. 288-1956, as amended. Ordinance No. 32 is as follows:

"An Ordinance granting to The Cleveland Electric Illuminating Company and its successors, the right to erect, construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys and ways of the Village of Euclid, for the purpose of furnishing to said Village, the general public and private persons, light, heat and power by electric currents.

"Section 1. BE IT ORDAINED by the Village Council of the Village of Euclid, State of Ohio, that The Cleveland Electric Illuminating Company and its successors, be, and they are hereby, granted the right to erect, construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground, as may be deemed by it or them necessary or essential to enable it to transmit electricity through and along the streets, alleys and ways of the Village of Euclid for the purpose of furnishing to said Village,

the general public and private persons, light, heat and power by electric currents.

"Section 2. All the wires used by The Cleveland Electric Illuminating Company shall be properly insulated, and shall comply with all state regulations and ordinances to be passed by this Village requiring proper insulation, and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland. And this grant shall be subject to all general ordinances now or hereafter in force in said Village.

"Section 3. The Cleveland Electric Illuminating Company or its successors shall before any work is commenced, submit to the proper officers of the Village, plans, showing the work it proposes to do in the erection of poles, wires, appliances, or in the building of conduits, and receive a proper permit therefor each time before any new work shall be undertaken, and, they shall be kept upon file in the office of the Village Clerk, with a proper record, showing that a permit for their construction has been entered, and thereupon The Cleveland Electric Illuminating Company or its successors shall have the right to proceed with its or their work in accordance with the plans and specifications placed on file by it or them.

"Section 4. No pole or mast shall be erected by The Cleveland Electric Illuminating Company or its successors without the consent of the property owner before whose premises the said pole or mast is proposed to be placed; and the location of any pole, pier or support shall be subject to the control and direction of the Council of the Village of Euclid and shall be changed by The Cleveland Electric Illuminating Company or its successors to such other location as may be directed whenever in the opinion of the Council the best interest of the Village and the general public demand the removal of the same.

"Section 5. The Cleveland Electric Illuminating Company shall protect and indemnify the Village of Euclid, upon any and all claims for damages which may in any wise arise from the exercise of the rights and privileges herein granted.

"Section 6. The Cleveland Electric Illuminating Company shall within ten days from the passage of this ordinance, file with the Village Clerk a written acceptance of the conditions of this ordinance, and shall pay the cost of publication of this ordinance.

"Section 7. This ordinance shall take effect and be in force from and after its passage and legal publication and the filing of the foregoing acceptance and the payment of costs of publication by The Cleveland Electric Illuminating Company."

The consent to occupy the streets with overhead lines contained in Ordinance No. 32 was given pursuant to Ohio Revised Code § 4933.13, which is as follows:

"§ 4933.13. A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires."

The consent to occupy the streets with underground lines contained in Ordinance No. 32 was given pursuant to Ohio Revised Code, § 4931.20. That section refers to tele-

graph companies but under Ohio Revised Code § 4933.14 applies also to electric companies. Section 4931.20 is as follows:

> "§ 4931.20. Any company owning and operating a telephone exchange or doing a telegraph business, in any municipal corporation in this state, may construct and maintain underground wires, pipes, conduits, and other fixtures for containing, protecting, and operating such wires, in the streets and public ways of such municipal corporation, when the consent of such municipal corporation has been obtained. Any ordinance of any village purporting to grant the right or privilege to any telephone or telegraph company to construct and maintain underground wires and pipes, conduits, and other underground fixtures for containing, protecting, and operating such wires, in the streets and public ways of such village, when such grant has been accepted, or when money has been expended in good faith on account thereof, is valid and effective."

The foregoing sections have not been amended since the enactment of Ordinance No. 32 in 1906, except for non-substantive changes by revisors.

QUESTIONS PRESENTED.

The Relator-Appellant has a franchise from the State of Ohio to do business in the Respondent-Appellee, City of Euclid, and through northeastern Ohio, and the consent of said City to occupy its streets with its wires and poles, either overhead or underground, as may in the discretion of Relator-Appellant be reasonable and necessary to serve the public with electric service. Such consent was given in 1906 by a franchise contract containing no limit as to time. The Respondent-Appellant City passed an ordinance prohibiting the crossing above ground of any of its streets by an electric line carrying electricity at voltages greater than 33,000 and prohibiting the construction of an electric line of any kind unless it is solely for the "normal requirements" of consumers within said City. The City of Euclid is a suburb of Cleveland, Ohio, and is one of a large number of contiguous municipalities which make up the area of metropolitan Cleveland. On the basis of the ordinance referred to, the Relator-Appellant was denied a permit to cross six streets with the conductors of a proposed 132,000 volt overhead steel tower line constructed next to a railroad on private right-of-way.

After six weeks of trial the trial court, which was the trier of facts, expressly found that the proposed lines would not create any appreciable adverse effect on the public health, welfare or safety and that the application of the ordinance to prohibit the permit for the line had no reasonable relation to the ends for which the police power might be constitutionally exercised and would be an impairment of the rights of Relator-Appellant under its franchise ordinance and a deprivation of its property without due process of law, and further found, *inter alia*, that the 132,000 volt line would not create any appreciable hazard, that placing of the line underground would

cost the utility four and one-half times as much as placing it overhead (an excess cost of about $4,500,000) and that the application of the ordinance to prohibit the issuance of a permit for the 132,000 volt line was arbitrary and unreasonable and a deprivation of the property of the utility without due process of law and an impairment of the franchise ordinance.

The Supreme Court of Ohio reversed on the ground that the requirement of underground construction was a reasonable exercise of the police power. This conclusion was based upon "judicial notice" that the prohibited overhead construction would be dangerous, contrary to the express finding of fact, based upon evidence, of the court below.

The following questions are presented:

1. Was Relator-Appellant denied the procedural due process of law which is protected by the Fourteenth Amendment to the Constitution of the United States when the Supreme Court of the State reversed the decision of the lower court in a case where the question litigated was whether the ordinance is unreasonable and arbitrary and contrary to due process of law in its application to a particular factual situation, by taking judicial notice of the ultimate question of fact contrary to the contention of Relator-Appellant and contrary to the express findings of fact made by the trier of facts after hearing evidence and without reviewing the record to determine whether the findings of fact were supported by the evidence?
2. Was Relator-Appellant denied the due process of law which is protected by the Fourteenth Amendment of the Constitution of the United States, or was its franchise contract impaired by the State of Ohio, in violation of Article I, Section 10, of the Constitution of the

United States, when the Supreme Court of Ohio reversed the decision of the lower court in a case where the question litigated was whether the application of the ordinance to a paricular fact situation was unreasonable and arbitrary when such reversal was on the ground that the general subject matter of the ordinance was a proper subject for police regulation —which was not in issue but admitted by Relator-Appellant—and such Court failed and refused to consider whether the application of the ordinance to the facts before it was reasonable?

3. Is the application of the ordinance a deprivation of the property of Relator-Appellant without due process of law when the ordinance is applied to prohibit the issuance of a permit for the crossing of six streets in the City by the conductors for a 132,000 volt electric transmission line when the lower court found, as facts, that the transmission line would create no appreciable hazard to the public and the construction of the line underground would cost 4.5 times more than the proposed line and found as a matter of fact and law that the prohibition of this line was an arbitrary and unreasonable application of the ordinance, having no real or substantial relation to the public health, safety or welfare, and these findings of fact and law were not found by the Supreme Court of Ohio to be unsupported by the evidence or erroneous?

4. Is the prohibition by ordinance of construction within the City for the service in part of electric consumers outside the City an impairment of Relator-Appellant's perpetual franchise to erect overhead or underground electric lines within the City for the service of the public, in violation of Article I, Section 10, of the Constitution of the United States?

STATEMENT OF THE CASE.

Relator-Appellant, called The Illuminating Company herein, is an Ohio public utility corporation engaged in the business of producing and selling electric energy for light, heat and power purposes to all classes of consumers in the northeastern Ohio area. There are ninety separate municipalities within this service area (Appendix A, page 17, hereinafter referred to as A).

All of the properties of The Illuminating Company are completely integrated and inter-connected, constituting a single operating unit for the generation and distribution of electricity. In order to serve its customers, including the City of Euclid and its residents, Relator-Appellant must be able to provide energy wherever and whenever it is needed. This means that its generation capacity must be such as to permit it to provide full peak capacity at any given moment. Electric energy is generated at four plants located on the shores of Lake Erie (A. 18). Energy leaves the generating plants at 132,000 volts and is carried on a system of steel tower transmission lines encircling Relator-Appellant's service area, interconnecting all points and providing emergency interconnections with adjoining utilities (A. 18-19). Energy fed into the system at any point may be made available at any other point on the system (A. 19). High-voltage is required for the bulk transmission of electricity. Six 33,000 volt circuits would be required to equal the capacity of one 132,000 volt circuit (A. 19). Except for a few customers, voltage must be reduced below 132,000 volts before delivery to consumers. This is done at transmission and distribution substations (A. 19-20).

By Ordinance No. 32 of the Village of Euclid, passed July 9, 1906, the Village granted to The Cleveland Electric Illuminating Company "* * * the right to erect, con-

struct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground as may be deemed by it * * * necessary or essential to enable it * * * to transmit electricity through and along the streets, alleys and ways of the Village of Euclid, for the purpose of furnishing to said village, the general public and private persons, light, heat and power by electric current." (Section 1.) Section 2 of Ordinance No. 32 requires that the "* * * grant shall be subject to all general ordinances now or hereafter in force in said village."

This ordinance was accepted, as required by Section 6 thereof, by Relator-Appellant on July 25, 1906. Ordinance No. 32 is unlimited in time. This Court has held that such Ohio city ordinances create a perpetual franchise which is not terminable at will: *Northern Ohio Traction and Light Company v. Pontius*, 245 U. S. 574 (1918); *Ohio Public Service Co. v. State ex rel. Fritz*, 274 U. S. 12 (1927).

The City of Euclid obtains electric energy in part from the Lloyd substation of The Illuminating Company, which is located near Wickliffe, Ohio, just east of the City of Euclid (A. 22-23). Substations are not of unlimited capacity (A. 22). Tremendous industrial and population growth has occurred in and near Euclid in recent years (A. 23-24). The Illuminating Company determined in 1955 that it was necessary to build a new substation to relieve the load on Lloyd. The best way to provide such relief is to transmit energy at 132,000 volts from one of the company's generating plants at Eastlake, Ohio (east of Euclid and of Wickliffe) to a new substation in East Cleveland (west of the City of Euclid). Sixteen 33,000 volt circuits now supplying electricity in Euclid and vicinity from the Lloyd Substation will be attached to the new substa-

tion and also to Lloyd so the circuits can be supplied from both ends (A. 24-25).

The Illuminating Company proposes to transmit energy at 132,000 volts from Eastlake generating station to the new substation by overhead lines suspended by conductors from steel towers. The line will be constructed entirely on a ninety-foot wide private right-of-way along the Nickel Plate Railroad Company tracks. The length of the entire line is 7.5 miles, of which 3.57 miles is in Euclid (A. 14). The whole of the line will be built in an industrial area. The line will be suspended from steel towers placed on reinforced concrete footings at a height of from 52 to 64 feet. Each tower will be grounded for safety in the event it is struck by lightning. If a line breaks, or if a conductor is damaged, an automatic relay system breaks the circuit and de-energizes the line in 1/20th of a second (A 25-26), or before it could strike any building or other object (A. 74).

The 132,000 volt line would cross over six streets in the City of Euclid, one of which is a "paper street" which has never been constructed (A. 14). Formal application was made by Relator-Appellant for a permit to cross six streets of the City of Euclid with the conductors for the proposed 132,000 volt line on April 24, 1957 (131). The application was denied on June 17, 1957, by Resolution 147-1957 (A. 48).

Relator-Appellant filed its Petition for a Writ of Mandamus with the Court of Appeals for Cuyahoga County, Ohio, on July 9, 1957, in which it prayed for the Court to issue a writ of mandamus directed to the City of Euclid, its Mayor and Administrative Director, and the other parties respondent, requiring them to grant to Relator-Appellant a permit to erect and maintain across the six streets named therein the lines and conductors of the

132,000 volt overhead transmission line which has been described. In its Petition, Relator-Appellant asserted, *inter alia*, that it had the right by franchise contract (Ordinance No. 32) to construct such transmission line overhead and across the streets of the City of Euclid in the manner proposed, subject only to its compliance with reasonable police regulations of the City of Euclid. It asserted that the amendment to Ordinance No. 288-1956 contained in Ordinance No. 78-1957 is arbitrary and capricious and deprives Relator-Appellant of its right to use the streets of Euclid in contravention of the Constitutions of Ohio and of the United States because it has no reasonable relationship to the health, safety and welfare of the City of Euclid and its inhabitants. Further, Relator-Appellant asserted that the refusal of the Respondents-Appellees to grant the permit sought for the 132,000 volt overhead electric transmission line resulted in an impairment of the obligations owing Relator-Appellant by Respondents-Appellees under Ordinance No. 32, in contravention of the Constitutions of Ohio and of the Constitution of the United States.

Relator-Appellant's motion for the appointment of a Special Master Commissioner to hear the evidence and report findings of fact and conclusions of law was granted on October 2, 1957 and Clinton DeWitt, Esq., Professor of Law at Western Reserve University, was appointed Special Master with the consent of all counsel.

Trial was commenced to the Special Master on December 11, 1958 and concluded on January 10, 1959. Voluminous testimony was taken, most of which was directed toward the question of whether the 132 KV line for which the permit was sought would create any appreciable adverse effect upon the public health, welfare and safety of the residents of Euclid and the community in general; whether there was any rational basis for re-

quiring that the proposed 132 KV line be placed underground and whether, on a balance of interest between the City of Euclid and the Relator-Appellant, there was any rational basis founded in the protection of the public health, welfare and safety of the residents of the City of Euclid and of the community in general for denying the issuance of the permit.

After final arguments and the submission of Briefs, the Special Master Commissioner filed his report on July 21, 1958 and recommended that the Court issue the Writ of Mandamus as prayed for.

Some of the findings of the Master are:

1. The proposed 132 KV line is necessary to enable Relator-Appellant to serve the Cleveland and northeastern Ohio area, including the industrial corridor along the Nickel Plate Railroad line in the City of Euclid (A. 25);

2. Ordinance No. 32, enacted in 1906 by the Village of Euclid, created a franchise contract and enables Relator-Appellant to use the streets of Euclid for the placing of its electric lines subject to regulations enacted by the Village and its successors in the reasonable exercise of the police power, which franchise right is perpetual and not terminable at the will of either party (A. 25);

3. Ordinance No. 32 grants Relator-Appellant a franchise right to place poles and electric lines in the streets of Euclid without regard to whether the electricity carried in such a line is destined for consumers in the City of Euclid or outside the corporate limits of Euclid (A. 42);

4. Ordinance No. 283-1956 destroys part of the franchise rights of Relator-Appellant since it prohibits the issuance of a permit for electric lines which serve, wholly or in part, persons outside the corporate limits of Euclid (A. 62-63);

5. In so far as Ordinance No. 288-1956 deprives Relator-Appellant of its right to use the streets of Euclid for facilities for the transmission of electric energy to consumers located outside the city limits of Euclid, it bears no real or substantial relation to the public health, morals, welfare and safety and is not a reasonable regulation enacted in the lawful exercise of the police power (A. 65-66);

6. Ordinance No. 288-1956 is an impairment of Relator-Appellant's franchise rights and is an arbitrary and unreasonable exercise of the police power and therefore violates Article I, Section 10, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (A. 67);

7. So far as human prediction will permit, the construction and operation of the proposed 132 KV overhead line will not, in any appreciable degree, endanger the lives or property of the inhabitants of the City of Euclid or of the public in general (A. 80);

8. The cost of placing the 132,000 volt line underground will be $4,468,000, or $3,478,600 in excess of the cost of constructing the line and additional annual costs of $500,000 would be imposed on Relator-Appellant by underground construction, all of which would result in increased rates by Relator-Appellant (A. 90);

9. Even if Ordinance No. 78-1957 is deemed regulatory, it is unduly oppressive because it inflicts an intolerable hardship upon Relator-Appellant by compelling it to make an excessive, wasteful and needless investment which has no foundation in reason, and is a mere arbitrary or irrational exercise of power having no real or substantial relation to the public health, safety, morals or public welfare in its proper sense (A. 91);

10. The restraints imposed upon Relator-Appellant by Ordinance No. 78-1957 are in violation of its franchise

and present an extreme case of harshness and oppression, because the ordinance under the circumstances of this case bears no real or substantial relationship to the public health, safety, morals or welfare, and is unnecessary, arbitrary and unreasonable and invalid as being in contravention of Relator-Appellant's Constitutional rights under Section 10, Article I, and Section 1, Fourteenth Amendment of the Constitution of the United States (A. 91-92).

Relator-Appellant moved the Court of Appeals for Cuyahoga County, Ohio, for an order confirming the Report of the Special Master Commissioner and for judgment. Exceptions of Respondents-Appellees were overruled and the Report was adopted as its own by the Court of Appeals on November 19, 1958, and a writ in mandamus ordered to issue against the Respondents-Appellees (A. 133-134).

Appeal was taken to the Supreme Court of Ohio by Respondents-Appellees on January 6, 1959 where, on July 15, 1959, that Court, in an opinion concurred in by four judges, reversed the judgment of the Court of Appeals. Three judges dissented. The Supreme Court of Ohio decided the Federal constitutional questions adversely to the claim of Relator-Appellant without reviewing the record, the findings of fact, or the weight of the evidence in the proceedings before the Court of Appeals.

Although it was not suggested by any counsel, the Court considered that the question before it was whether, in the abstract, a requirement of underground construction is within the ambit of the police power. It took judicial notice of the fact that high-voltage electricity is a dangerous commodity and that high-voltage electric wires stretched across public streets constitute a danger to the traveling public, all contrary to the findings of fact as to the specific situation before the Court. The litigants had

not suggested that judicial notice of these facts should be taken. The Court refused to consider the application of the ordinance to the specific facts before it, although these facts were the ultimate questions to which the evidence of Relator-Appellant and Respondents-Appellees was directed in the trial. Upon the basis of its conclusion that high-voltage electricity is, in its nature, dangerous, the Supreme Court ruled that Ordinance No. 288-1956 as amended is a reasonable exercise of the police power. The question of whether the application of the ordinance, to deny Relator-Appellant a permit for this particular transmission line, was arbitrary and unreasonable and contrary to constitutional guarantees was not considered by the Supreme Court of Ohio.

An application for rehearing was filed by Relator-Appellant on July 28, 1959, in which it urged the Supreme Court had erred *inter alia*:

1. By taking judicial notice of the fact that high-voltage electricity is dangerous in spite of a finding of fact below, based upon evidence in the Record, that the construction of this overhead high-voltage line creates no appreciable hazard, and such action by the Supreme Court controverts the procedural due process requirements of the Fourteenth Amendment of the Constitution of the United States; and
2. By failing to determine whether the ordinances were reasonable exercises of the police power in their application to the facts of this case, and whether they deprive Relator-Appellant of its property without due process.

A rehearing was granted on August 12, 1959 and heard on October 6, 1959. On November 4, 1959, the Supreme Court of Ohio announced, *per curiam*, that it would adhere to its former judgment.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND REQUIRE PLENARY REVIEW BY THIS COURT.

1. The Supreme Court of Ohio committed reversible error by failing to determine whether the Ordinance of the City of Euclid complained of was arbitrary and unreasonable and contrary to due process in its application to the facts before the Court.

The Supreme Court of Ohio did not decide the principal Federal question urged by Relator-Appellant. An examination of the opinion of that Court (A. 1-9) demonstrates that it decided only that Ordinance No. 288-1956, as amended, in so far as it prohibits overhead construction, is, on its face, within the ambit of the police power.

Relator-Appellant does not and never has claimed otherwise. The essence of this litigation is the contention that the Ordinance is arbitrary and unreasonable in its application to the particular facts presented by the Record. The action was instituted to compel the issuance of a permit for the construction of a specific 132,000 volt overhead electric transmission line through Euclid on a private right-of-way adjacent to a railroad in an industrial area. Relator-Appellant contended in the Court of Appeals that this transmission line could and would be constructed in a manner which would create no appreciable hazard to the health, safety and welfare of the community. It was contended that to apply the prohibition of Ordinance No. 288-1956, as amended by Ordinance No. 78-1957, against all lines which do not serve Euclid residents exclusively, and against overhead lines in excess of 33,000 volts where, as here, they create no hazard, is unreasonable and without any rational relation to the ends for which the police power may constitutionally be exercised.

The Special Master Commissioner, who was the initial trier of facts, heard considerable evidence as to whether the

line in question could be constructed and maintained without hazard to the community and as to whether the Ordinance had any rational relation to the public health, welfare and safety of the residents of Euclid in so far as the Ordinance prohibited the proposed overhead transmission line. The conclusions of the trier of fact, in part, are:

1. "[The prohibition, in Ordinance No. 288-1956, against lines if they serve consumers outside Euclid] * * * neither promotes, nor even tends to promote, the public good * * *." (A. 66.)
2. "* * * the route [for the line] selected by Relator is, in every respect, an ideal one for the location of its proposed line through the city of Euclid." (A. 70.)
3. "* * * so far as human prediction will permit, the construction and operation of Relator's proposed overhead lines will not, in any appreciable degree, endanger the lives or property of the inhabitants of the city of Euclid or of the public in general." (A. 80.)
4. "* * * the excess cost of constructing the line underground is $3,478,600.00 which, approximately, is seven times larger than the cost of constructing it overhead; this increased investment * * * would mean that annual costs to Relator for having this line underground would be $500,000.00 greater than with the line constructed overhead; the impact of increased costs will be reflected in higher electric rates to the public as consumers." (A. 90.)
5. "* * * [the prohibition of this line] inflicts an intolerable hardship upon Relator by compelling it to make an excessive, wasteful, and needless investment which has no foundation in reason and is a mere arbitrary or irrational exercise of power having no real or substantial relation to the public health, safety, morals or the public welfare in its

proper sense. It is not alone the prohibitive monetary loss to Relator which here compels a finding of invalidity, but that such loss is utterly unrelated to any substantial benefit to be derived." (A. 91.)

These findings were adopted by the Court of Appeals as its own (A. 133-134).

These findings of fact and of law were not overruled, were not questioned and were not even considered by the Supreme Court of Ohio. The Supreme Court refused to review the Record. It phrased the question before it as:

"* * * is a regulation requiring high-voltage wires to be placed underground reasonable?" (169 Ohio St. 476, at 479, A. 5.)

The Court "judicially noticed" that high-voltage electricity is dangerous and ruled:

"* * * a requirement by a municipality that high-voltage wires be placed underground constitutes a reasonable exercise of the police power." (169 Ohio St. 476, at 481, A. 6.)

From this it concluded that the Ordinance did not deprive Appellant of property without due process of law and further, the exercise of the police power being reasonable, there was no impairment of the franchise of Appellant.

The three dissenting judges met the issue of whether the Ordinance would be unconstitutional as applied to the facts before it and found:

"* * * that on the record of the undisputed evidence * * * the ordinance * * * is not sufficiently related to the health, safety and welfare of the inhabitants of Euclid as to be a reasonable exercise of the police power." (169 Ohio St. 476, at 486, A. 12.)

This Court has stated on many occasions that the question of the *power* of the state to enact a regulation in the exercise of its police power and the question of the

application of that regulation may not be the same. In *Nebbia v. New York*, 291 U. S. 502 (1934), a statute of New York, which enabled a state board to fix minimum and maximum prices for milk, was upheld against the contention that the due process clause of the Fourteenth Amendment prohibited such regulations. However, the opinion expressly notes that the same type of regulation might be invalid in other circumstances:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (291 U. S. 502, at 525.)

The difference between the valid area within which the police power may be exercised and the application of power to specific circumstance is set forth in *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), wherein the Court settled the question of the power of a municipality to ordain area-class zoning. The Court said:

> "* * * when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable." (272 U. S. 365, at 395.)

The issues in this case are similar to those presented in *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U. S. 405 (1935). A Tennessee statute permitted the

State Highway Commission to order that grade crossing separations be constructed at the intersection of railroad and a highway where necessary for the protection of the traveling public. The statute provided that one-half of the cost of the grade separation should be borne by the railroad. The Commission had ordered the Nashville, Chattanooga & St. Louis Railway Company to construct an underpass in the town of Lexington and had assessed one-half of the cost to the railroad. The railroad filed a bill for a declaratory judgment, alleging facts which it contended demonstrated that the application of the statute to require the railroad to pay half of the costs was arbitrary and unreasonable and deprived it of its property without due process of law. The railroad did not contest the power of the state to require the separation of grades, nor did it contest the reasonableness of the cost. The trial court found most of the allegations in the bill of complaint supported and ruled that the railroad could not constitutionally be charged with one-half of the cost of the grade separation. An appeal was taken to the Tennessee Supreme Court, which reversed the decision and declined to consider the special facts alleged to show that the application of the statute was arbitrary and unreasonable. This Court reversed and remanded, saying:

> "The Supreme Court declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; and that the Court could not 'any more' consider whether the provisions of the act in question

have been rendered burdensome or unreasonable by changed economic and transportation conditions, than it 'could consider changed mental attitudes to determine the constitutionality and enforceability of a statute.' A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably." (294 U. S. 405, at 414) * * *.

"Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them * * *." (294 U. S. 405, at 415.)

In *Chicago, St. Paul, Minneapolis & Omaha Railway Company v. Holmberg*, 282 U. S. 162 (1930), the Court ruled that a Nebraska statute which permitted the Public Utility Commission to require railroads to construct underpasses when an existing crossing was unsafe was valid on its face but, as applied to the particular situation before it, where the underpass was ordered for the convenience of a landowner, there was a deprivation of the property of the railroad without due process of law.

The foregoing cases clearly illustrate that an ordinance or statute may be a valid exercise of the police power as a general regulation but it may be so arbitrary and unreasonable when applied to particular facts that it amounts to a deprivation of property without the due process of law which is protected by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Ohio failed to consider the special facts.

which were averred by Relator-Appellant and found as facts by the Court of Appeals. It is these facts which Relator-Appellant contends made the application of the Ordinance unconstitutional. The Supreme Court of Ohio has committed the same error as was committed by the Supreme Court of Tennessee in *Nashville, Chattanooga & St. Louis Railway v. Walters, supra*. The question raised by the Petition and the Record here is the question which was reserved in *Euclid v. Ambler Realty Company, supra*, and *Nebbia v. New York, supra*. Whether the Supreme Court of Ohio erred by refusing to consider the unconstitutionality of the application of Ordinance 288-1956, as amended, to the specific overhead transmission line in question is a substantial Federal question.

2. The Supreme Court of Ohio denied the Relator-Appellant the fair hearing which is protected by the due process clause when it took judicial notice of the ultimate fact in issue, contrary to an express finding of fact by the trial court.

The Supreme Court of Ohio denied Relator-Appellant a fair hearing by its decision to take judicial notice that as a matter of fact high-voltage electricity is a dangerous commodity and that high-voltage electricity constitutes a danger to the traveling public where it crosses public streets (169 Ohio St. 476, at 480, A. 5-6). The Supreme Court of Ohio failed to review the special facts which Appellant claimed made the application of the Ordinance unreasonable. It did so by ignoring the findings of the Special Master and the Court of Appeals and taking judicial notice of the fact that high-voltage electricity is dangerous. From this premise it concluded:

> "Considering the dangerous propensities of high-voltage electricity, it is our conclusion that a require-

ment by a municipality that high-voltage wires be placed underground constitutes a reasonable exercise of the police power." (169 Ohio St. 476, at 481, A. 6.)

The question of whether the high-voltage electric line for which Appellant sought a permit was dangerous was an ultimate issue of fact in the case. Most of the evidence was directed to this question and the Master concluded that this overhead line "will not, in any appreciable degree, endanger the lives or property of the inhabitants of the City of Euclid or of the public in general." (A. 80.) This was adopted by the trial court as its own finding.

This Court does not appear to have specifically ruled whether an appellate court may, consistent with the principles of procedural due process, take judicial notice of a disputed question of fact, contrary to the finding of the trier of facts, which determines the rights of the litigants. It is conceded by Relator-Appellant that if a transmission line is such a danger to the traveling public as to reasonably require its elimination, it may be validly required to be placed underground if that will accomplish the objectives sought. But the reasonableness of requiring this specific line to go underground was the subject of six weeks of litigation in the trial court and required seven hundred printed pages of transcript. Specific findings of fact by the trial court were not only overturned by the Supreme Court of Ohio—they were ignored and judicial notice in conflict with the evidence and findings was substituted therefor.

It is submitted that the action of the Supreme Court of Ohio, in taking judicial notice of the ultimate factual issue, contrary to the findings of fact of the Special Master and the Court of Appeals, is a denial of the constitutional right of a fair trial which is protected by the Fourteenth Amendment of the Constitution. It is contrary to the most

elemental requisites of fair play to subject a litigant to the risk of having undisputed evidence and findings of fact overturned at the whim of an appellate judge who might think or wish that the facts are or ought to be different than those shown by the evidence.

This Court has ruled that the fact-finding process in a trial is protected by the due process requirement of "fair play." *Morgan v. United States*, 304 U. S. 1 (1938). In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937), a decision of the Supreme Court of Ohio was reversed on the ground that it had permitted improper use of judicial notice to the extent that a litigant was denied a fair hearing. The Ohio Bell Telephone Company had filed separate rate schedules for each of its exchanges with the Public Utilities Commission of Ohio. A number of these schedules were protested by municipalities or consumers affected and, under Ohio law, the Public Utilities Commission was required to investigate the reasonableness of the protested rate schedules. If no decision on the unreasonableness of the rate schedule was made within 120 days of the filing of the protest, the utility was authorized to collect the schedule rates under bond. The Commission consolidated a number of these cases and instituted a statewide investigation of the rates of Ohio Bell. The state law required the Commission in such a case to find the rate base for the company as of "a date certain" (§ 4909.05, Ohio Revised Code), which was set as June 30, 1925.

The Telephone Company filed an inventory which was supplemented every six months. A final decision on the intra-state rate base of the utility as of June 30, 1925, was issued in January of 1934. At the same time the Commission fixed a rate base valuation for the Company for each of the intervening years, 1926 through 1933, by tak-

ing judicial notice of price trends and modifying the rate base valuation found for June 30, 1925 by the percentage of decline or increase for each year. The utility had no warning that such a procedure might be followed by the Commission. A rehearing was requested and denied. The Supreme Court of Ohio affirmed the decision of the Commission.

This Court ruled that the Commission and the Supreme Court of Ohio had denied procedural due process to The Ohio Bell Telephone Company. It was said that:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." (301 U. S. 292, at 300.)

and:

> "This is not the fair hearing essential to due process. It is condemnation without trial." (301 U. S. 292, at 300.)

The Commission and the Supreme Court of Ohio attempted to uphold the decision as an instance of judicial notice. The opinion, rendered by Justice Cardozo, noted that judicial notice may be taken of certain economic conditions such as a decline in market values but that judicial notice does not serve to show the quantum of the decline.

The Court continued:

> "The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, § 2567; 1 Greenleaf, Evidence, 16th

ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid. Cf. Shapleigh v. Mier*, 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * True, the category is not a closed one. The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact *is* notorious to the community. 5 Wigmore, Evidence, § 2583. Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." (301 U. S. 292, at 301-302.)

An order of the I. C. C., fixing the division of interstate joint rates between several carriers, was appealed to this Court in *United States and Interstate Commerce Commission v. Abilene & Southern Railway Company*, 265 U. S. 274 (1924). The order was held void because it rested upon evidence not legally before the Commission. It was conceded that in making the order, the Commission had relied in part upon data taken from the annual reports of the carriers filed with the I. C. C. These reports were not formally put in evidence. The Court held the Commission's order to be void because it treated these reports as evidence. A distinction between facts which must be proved and matters which are peripheral to the issue was first noted.

> "The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice." (265 U. S. 274, at 287.)

The mere improper admission of evidence does not invalidate the order:

"But a finding without evidence is beyond the power of the Commission." (p. 288.)

and:

"Nothing can be treated as evidence which is not introduced as such." (p. 288.)

The Court of Appeals for the Sixth Circuit in *In re Bowling Green Milling Co.*, 132 F. 2d 279 (6th Cir. 1942), held that the application of the doctrine of judicial notice by the trial court under similar circumstances would be a denial of due process. That case arose from the bankruptcy of a grain elevator company. Claims were made by the holders of warehouse receipts for a return in kind of the grain represented by the receipts. The District Court took judicial notice of a "universal custom" that delivery of grain to a warehouse creates a sale and not a bailment. The Court of Appeals reversed and remanded the case on the ground that the Court erred in taking judicial notice saying:

> "Usage or custom cannot be availed of to dispense with evidence unless the fact shown thereby is certain and indisputable. Notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden or resorting to the usual forms of evidence. * * * 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'" Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 301, 57 S. Ct. 724, 729, 81 L. Ed. 1093. Here, as there, the matter is important because in the instant case the question whether the white receipt transactions were sales or bailments was the 'very point in issue.' This is another way of stating the rule that usage, to be availed of, must be well established, uniform, certain, fixed in character, and commonly known. Huston v. Peters, Hardin & Co., supra. We cannot consider, in a controversy where both parties

agree that no such custom existed, and both parties assign the ruling on this point as error, that there is no doubt concerning its existence. We recognize the superior opportunity for knowledge possessed by the District Court as to the existence of local customs or usages in Kentucky, but *to approve the application of the doctrine of judicial notice on the facts of the present case 'would be to turn the doctrine into a pretext for dispensing with a trial.'* Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, supra, * * *." (132 F. 2d 279, at 283-284.) (Emphasis supplied)

In *United States v. Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945), Judge Learned Hand refused to take judicial notice of certain figures contained in the "Truman Committee Report" where the fact to be noticed was in issue in the trial of the case.

"There is no reason why an appellate court upon deciding an appeal from such a judgment should not direct the district court what judgment to enter; and so it often does. Nor is there any reason why in deciding what judgment to direct, it should not advise itself from outside the record of such facts as appear to admit of no genuine dispute: i.e. should take 'notice' of whatever the district court itself might take 'notice.' Indeed, it would otherwise be impossible for an appellate court ever to dismiss an action upon the ground that it had become moot. We may, and we do, accept the figures of aluminum production in the report of the so-called 'Truman Committee' as of March, 1944, which showed that the annual production of 'Alcoa's' plant was about 828 million pounds; that the production of plants owned by the plaintiff which it had leased to 'Alcoa,' was about 1293 million pounds; and that the production of the Reynolds and Olin plants was together, 202 million pounds: a total of about 2300 million pounds. *The case is otherwise as to any facts already existing in August, 1940*, such

as the amount of bauxite in Arkansas, as to which the 'Truman Report' also contains figures. Even though we took 'notice' of these, the report would not be conclusive, or more than evidence. *We could not constitutionally substitute it for the findings of a court after a trial*: facts which a court may judicially 'notice' do not for that reason become indisputable. Wigmore, § 2567a. At most we could do no more than treat the report as newly discovered evidence, and send the issue back for another trial, which in the present case we should under no circumstances be willing to do. For these reasons we refuse to take 'notice' of facts relevant to the correctness of the findings; but we do take 'notice' of those relevant to remedies." (148 F. 2d 416, 445-446.) (Emphasis supplied.)

A state appellate court has held that it would be error to take judicial notice of a fact which was disputed at the trial. In *Kutner-Goldstein Co. v. Workman*, 112 Cal. App. 132, 296 Pac. 313 (1931), the evidence showed that plaintiff sold a grain binder to defendant in April of 1926. When the binder did not perform satisfactorily plaintiff agreed to repair the binder within a reasonable time. Plaintiff sent an employee to defendant on May 10, 1927, to repair the binder but defendant declined the services on the ground that the grain was too ripe to be cut with a binder. Plaintiff sued defendant for the balance of the contract price. The case was tried without a jury and the trial judge found for the plaintiff on the ground, *inter alia*, that plaintiff attempted to repair the binder within a reasonable time. At the trial, defendant introduced proof that May 10, 1927 was too late to cut grain efficiently with a binder. Plaintiff did not controvert this claim with evidence. On appeal it was held that the trial court erred since May 10, 1927, on the undisputed evidence, was too late for the use of the binder in that season

and therefore the repair had not been tendered within a reasonable time. The plaintiff argued that the appellate court should take judicial notice that the harvest season in that part of California was from June 15th through July 1st. The court noted that the plaintiff had presented evidence as to the time of the harvest season in 1927, and said:

> "Under the circumstances here presented, the doctrine of judicial notice may not be invoked to contradict the direct evidence on the fact." (296 P. 313, at 315.)

In *Panama Canal Company v. Wagner*, 234 F. 2d 163 (5th Cir. 1956), the appellant complained that the trial court had taken judicial notice that tenants in the Canal Zone were "captives" in that there was no free choice of housing accommodations. The majority opinion of the Court of Appeals found it unnecessary to consider this specification of error but Judge Rives, concurring, specially discussed it. He considered that taking of judicial notice of a fact in issue in the case would have been improper had the District Court not allowed the party opposing the fact noticed an opportunity to present evidence repudiating the fact so noticed.

Taking judicial notice of a fact does not make the fact so. *Professor Wigmore* states:

> "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is so because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable." (9 *Wigmore on Evidence* (3d Ed. 1940), § 2567(a), p. 535.) (Emphasis by author.)

Judicial notice of a fact therefore is similar to a presumption of fact. This Court has frequently held that a litigant

is denied the fair hearing which the due process clause of the Fourteenth Amendment of the Constitution protects when a state court permits a presumption to be weighed as affirmative evidence. For example, in *Georgia Railway & Electric Co. v. Decatur*, 295 U. S. 165 (1935), the railway contested a paving assessment on the ground that its property was not benefited by the improvement. The state court would not permit the railway to present evidence tending to show that it obtained no benefit because a presumption existed that the paving was beneficial. It was held that the railway had been denied procedural due process.

> "Certainly, competent proof tending to overcome a rebuttable persumption of material fact cannot be immaterial; and *the refusal of a court to* receive or *consider any proof* whatever on the subject *amounts to a denial of a hearing* on that issue, in contravention of the due process of law clause of the Constitution. * * *." (295 U. S. 165, at 171.)

In *Western & Atlantic Railroad v. Henderson*, 279 U. S. 639 (1929) a statute of Georgia was held unreasonable and arbitrary and violative of procedural due process in so far as it permitted a presumption of negligence to be given evidentiary weight.

In *Tot v. United States*, 319 U. S. 463 (1943), it was held that Congress had no power to provide, for purposes of prosecution under the Federal Firearms Act, that possession of a firearm or ammunition by a person convicted of a crime of violence, or who is a fugitive from justice, should be presumptive evidence that the firearm or ammunition was shipped, transported or received by such person in violation of the Act. Although the decision primarily turned upon the conclusion that there was no rational connection between the fact to be proved and the fact to be inferred, the Court said:

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, *it leaves the jury free to act on the presumption alone* once the specified facts are proved; unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision." (319 U. S. 463, at 469.) (Emphasis supplied.)

The Supreme Court of Ohio in the case at bar has applied judicial notice to contravene the findings of fact of the Master Commissioner and the Court of Appeals. Judicial notice was taken of the matter which is the ultimate question of fact in the litigation. The effect of the use of the doctrine by the Ohio Supreme Court is to render nugatory all of the fact finding procedure of the trial court. This clearly, in the words of Justice Cardozo, is "to turn the doctrine into a pretext for dispensing with a trial." (*Ohio Bell Telephone Co. v. P. U. C. O.*, 301 U. S. 292, at 302.)

There is no precedent in the law of the state for the procedure followed by the Supreme Court here. Section 2505.31, Ohio Revised Code, with exceptions not presently relevant, provides that the Supreme Court of Ohio is not required to pass upon the weight of the evidence in reviewing cases appealed to it. In practice, § 2505.31, Revised Code, means that the Court accepts the findings of fact of the courts of appeal unless they "are not supported by substantial evidence." *Gemco Engineering & Mfg. Co. v. Henderson*, 151 O. S. 95 (1949); *Jaffrin v. DiEgidio*, 152 O. S. 359 (1949); *State ex rel. Kobelt v. Baker*, 137 O. S. 337 (1940). The rule is followed in situations similar to that at bar in which the reasonableness of a specific application of the police power is questioned. Such was

precisely the situation in *East Fairfield Coal Co. v. Booth*, 166 Ohio St. 379 (1957), in which the Court said:

> "Without weighing the evidence and without expressing an opinion concerning the wisdom of the ordinance, this court does hold that this record discloses substantial evidence supporting the conclusion of both lower courts that the township zoning ordinance * * * is arbitrary and unreasonable and deprives the plaintiffs of their property without due process of law * * *." (166 O. S. 379, at 384.)

The application of the doctrine of judicial notice is particularly arbitrary and unreasonable in this case because the Supreme Court of Ohio used it as the basis of its refusal to review the record to determine whether Ordinance 78-1957 is unconstitutional in its application on the facts of the case. We have shown in the first section of this Brief that such a refusal is itself a denial of due process. *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U. S. 405 (1935).

To illustrate the danger of extending the doctrine of judicial notice as was done in the case at bar, assume the reverse of the findings in this case, i.e., that the trial court found, on substantial evidence, that the wires to be suspended over the five existing streets in the City of Euclid would, in fact, create a real and continuing hazard to the public safety, health and welfare. Under the rule adopted by it here, the Supreme Court of Ohio could take judicial notice that thousands of miles of such lines exist throughout the United States, and in Ohio, with many thousands of crossings over streets and highways, and that therefore the particular line must be safe and would constitute no hazard!

3. The ordinances unlawfully revoke rights granted Relator-Appellant by its franchise contract, contrary to Article I, Section 10, of the Constitution of the United States.

The Ordinance complained of, No. 288-1956, as amended by Ordinance No. 78-1957, prohibited the construction proposed by Relator-Appellant on two grounds: (1) that it was to be overhead rather than underground, and (2) that its function was not solely to serve consumers within the City of Euclid. Having decided that the construction was validly prohibited on ground (1) the Supreme Court of Ohio did not pass on whether the second ground constituted an unconstitutional impairment of Relator-Appellant's contract. If this Court should hold, as did the Court of Appeals of Ohio, that the prohibition of overhead construction is unconstitutional as to the line in question, then the question is presented whether the prohibition of construction to serve those outside the City is an unconstitutional impairment of contract. The Court of Appeals of Ohio held that it was.

Relator-Appellant contended that its rights under the franchise ordinance of 1906, No. 32, were impaired by the 1956 and 1957 ordinances, in the following manner:

1. Ordinance No 32 permits Relator-Appellant to place electric lines in the city streets without regard to whether the lines carry electricity for consumers inside or outside the city limits, but Ordinance No. 288-1956 prohibits the issuance of a permit for any electric line in the streets which will carry electricity for consumers outside the city limits;
2. Ordinance No. 32 exhausted the power of the city to consent to the placement of electric lines in the city streets and thereafter the city could only regulate

electric lines but Ordinance No. 288-1956, as amended, prohibits electric lines to serve those outside the city.

The Special Master Commissioner and the Court of Appeals found, as a matter of law, that the franchise ordinance of 1906:

> "* * * authorizes and empowers Relator to use the streets of the city of Euclid—subject, of course, to reasonable regulations—, for its corporate purposes without regard to the question of whether the electricity supplied by it serves not only the city of Euclid and its inhabitants, but also other consumers in areas beyond the corporate limits of the city of Euclid." (A. 42.)

The Master found that Ordinance No. 288-1956, in terms, prohibits the placing of any electric wires along the city streets if such wires are to be used for supplying electric energy to persons who are not inhabitants of Euclid (A. 62), and, therefore, the Ordinance does not regulate, but "utterly destroys a valuable right unconditionally granted Relator by Ordinance No. 32" (A. 63-64). Further, it was found that the prohibition of electric lines in Euclid which served other areas had no reasonable relation to the public health, safety and welfare (A. 65-66).

Relator-Appellant contended, an the Court of Appeals agreed, that the passage by Euclid of Ordinance No. 32 constituted a complete and final "consent" as contemplated by Section 4933.13 of the Ohio Revised Code. Thereafter the City of Euclid could only regulate the placement of overhead lines along and across the city Streets. It could not revoke its consent given in Ordinance No. 32.

Ordinance No. 78-1957 does not merely regulate the placement of lines along and across the streets of Euclid. It prohibits lines to serve outside the City. This is a partial revocation of the consent granted by Ordinance No.

32, and is a destruction of a right obtained by Relator-Appellant from the franchise ordinance. Moreover, in a populous highly-integrated industrial area, it is absurd.

Whether a franchise contract has been unconstitutionally impaired is a Federal question and in deciding that question the meaning and nature of the contract involved is a Federal question. *Russell v. Sebastian*, 233 U. S. 195, 202 (1914); *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 590 (1908); *Atlantic Coast Line Rd. Co. v. Goldsboro*, 232 U. S. 548, 556 (1914). Franchise contracts similar to that contained in Ordinance 32 have been held by this Court to be perpetual. *Northern Ohio Traction & Light Co. v. Pontius*, 245 U. S. 574 (1918), reversing 93 Ohio St. 466, 114 N. E. 53 (1915); *Ohio Public Service Co. v. Fritz*, 274 U. S. 12 (1927), reversing 113 Ohio St. 325, 149 N. E. 129 (1925).

It is settled that a municipal ordinance adopted under state authority is "state action" within the scope of Article I, Section 10, and Section 1 of the Fourteenth Amendment of the Constitution of the United States. *Staub v. City of Baxley*, 355 U. S. 313 (1958); *Grand Trunk Western Ry. v. City of South Bend*, 227 U. S. 544, 556 (1913).

4. An ordinance is considered a "statute" of a state for purposes of determining the appeal jurisdiction of this Court.

This Court has jurisdiction under 28 U. S. C. Section 1257(2) to review, by appeal, the decision of the Supreme Court of Ohio. Appellant has questioned the validity of Ordinances No. 288-1956 and No. 78-1957 of the City of Euclid as being repugnant to Article I, Section 10, and the Fourteenth Amendment of the Constitution of the United States, and the decision of the highest court in the State is in favor of the validity of the Ordinances.

The cases clearly hold that an ordinance of a municipality is a "statute of any state" as that term is used in the statute. This was settled in *King Manufacturing Co. v. City Council of Augusta*, 277 U. S. 100 (1928), where an appeal was taken from the decision of the state supreme court upholding a city ordinance claimed by appellant to be an impairment of contract. It was ruled here that "statute" must be interpreted broadly as including any legislative act:

> "It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise. As respects their validity under the Constitution of the United States all are on the same plane." (277 U. S. 100, at 103-104.)

The rule of the *King Manufacturing Co.* case was adhered to over the objection of appellee in *Jamison v. Texas*, 318 U. S. 413 (1943), where the appeal was from the decision of the Texas Supreme Court, upholding an ordinance of the City of Dallas. In a number of recent cases this Court has held it had jurisdiction under 28 U. S. C., § 1257(2), to entertain an appeal from a state supreme court where that court upheld a municipal ordinance claimed by appellant to be repugnant to the Constitution of the United States. See *Breard v. City of Alexandria*, 341 U. S. 622,

625 (1951); *Poulos v. State of New Hampshire*, 345 U. S. 395, 402 (1953); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 79 (1947).

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